



DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Memorandum  
INDIAN HEALTH SERVICE

Date December 31, 1984 *MM*  
From : Richard J. McCloskey, Chief,  
Legislation and Regulations Branch, OPEL  
Subject: Legal Opinion to be Added to the "Compendium of Legal Opinions  
Concerning the Indian Health Service"  
To : See Below

Attached is a legal opinion subject: Waiver of 15% Economy Act Limitation

DATE OF OPINION: 8/27/84

SOURCE: OGC/X

If you are in addressee Category A or B (see below), you should place the opinion in your Compendium in chronological order. No future publication or distribution of this opinion will be made. The opinion will be indexed under the following subject(s) which you should note in your Compendium's "Subject Index" until such time as a revised "Subject Index" is published and distributed:

Alaska; Economy Act; Lease; Real Property

Occasionally, an opinion will require establishment of a new Subject which must be added to the Subject Index. Any new Subjects required by this opinion follow:

None

If you are in Category C, you are being sent this opinion because of some factor specific to this opinion or your responsibility. You will not receive other opinions as a matter of course. You may be able to utilize the Compendium held by Category A and B addressees. The addressees represent the total distribution being made of this opinion by the Legislation and Regulations Branch.

Attachment  
Legal Opinion

COMPENDIUM ADDRESSEES

Category A:	<u>Holders of the full Compendium</u>
Director	Indian Health Service (1 Set)
Analyst	Legislation and Regulations Branch (IHS Master Set)
Chief	Legislation and Regulations Branch, IHS (1 Set)
Sr. Analyst	Legislation and Regulations Branch, IHS (1 Set)
Director	Aberdeen Area Office (1 Set) <u>Attn</u> : Area Director;

(Continued on Reverse)



DEPARTMENT OF HEALTH & HUMAN SERVICES

RFO 84-7  
August 27, 1984  
Office of General Counsel

Region X  
M/S 509  
2901 Third Avenue  
Seattle, WA 98121

August 27, 1984

Mr. G.H. Ivey, Director  
Alaska Area Native Health Service  
Post Office Box 7-741  
Anchorage, Alaska 99510

Attention: Kenneth R. Harper

Dear Mr. Ivey:

Mr. Harper of your staff has recently shown me a copy of an August 8, 1984, letter to him from Judith Nelson, Business Manager for Choggiung Limited of Dillingham. That letter states that

Choggiung Limited has further researched the possibility of constructing and leasing the 34 units of multi family housing at Kanakanak. At this time, due to high interest rates, the only possible way of making the project feasible is to have a waiver of the 15% rule granted.

Choggiung is interested in pursuing this project if it can be made financially feasible.

Mr. Harper asked for our opinion as to the legal possibility of a waiver of the "15% rule" being granted.

The 15 percent rule is found at 40 U.S. Code 278a (Act of June 30, 1932, Chapter 314, Section 322; 47 Stat. 412.) It provides, in pertinent part, as follows:

After June 30, 1932, no appropriation shall be obligated or expended for the rent of any building or part of a building to be occupied for Government purposes at a rental in excess of the per annum rate of 15 per centum of the fair market value of the rented premises at date of the lease under which the premises are to be occupied by the Government....

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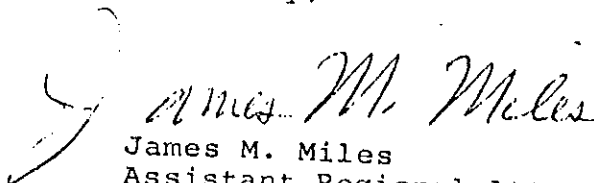
G.H. Ivey - Page 3

Still, it is now three years since the enactment of P.L. 97-51, and GSA has behind it a three-year period in which it has consistently operated as though Congress had indeed repealed the fifteen percent limit. Apparently no one has challenged the GSA interpretation. Nor is a challenge likely, unless it were to come from a disgruntled taxpayer or disappointed potential lessor.

Given the above, it is our opinion that you would be permitted to exceed the fifteen percent limit, based on the GSA interpretation that it no longer applies and the fact that GSA is the lead agency of the Government on real property matters. We should probably follow their lead on this issue. Still, every effort should be made to negotiate a lease amount which falls within the fifteen percent rule, if at all possible, which is what we did on the Calista 47-Units. Any lease amount proposed which falls significantly outside the fifteen percent limit should be very closely scrutinized. I would think there should be very extraordinary circumstances present before IHS would agree to a lease that does not meet the constraints of 40 U.S. Code 278a. On a new building, particularly, it would seem to me that compliance with the fifteen percent limit should provide sufficient rent to keep any prudent lessor afloat in terms of the lessor's overall array of costs.

If you would like to discuss this issue further, please do not hesitate to get in touch with us.

Sincerely,

  
James M. Miles  
Assistant Regional Attorney

cc: Robert M. Mommsen



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Concerning the Indian Health Service"

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(Continued on Reverse)

Category A: Holders of the full Compendium (Cont'd)

Director, Alaska Area Office (4 Sets) Attn: Area Director; Office of Program Formulation; General Services Branch; and Alaska Native Medical Center  
Director, Albuquerque Area Office (1 Set)  
Director, Bemidji Program Office (1 Set) Attn: Mr. Lefebvre  
Director, Billings Area Office (1 Set) Attn: Ms. Christensen  
Director, California Program Office (1 Set)  
Director, Navajo Area Office (2 Sets)  
Director, Oklahoma City Area Office (1 Set)  
Director, Phoenix Area Office (1 Set) Attn: Mr. Palone  
Director, Portland Area Office (1 Set)  
Director, Office of Research and Development (Tucson) (1 Set)  
Director, Nashville Program Office (1 Set)  
OGC Public Health Division (1 Set) Attn: Mr. McCloud  
PHS Indian Hospital, Rapid City, South Dakota (1 Set) Attn: Ms. Mildred Breen  
DHHS Regional Attorney, Region V, Chicago (1 Set) Attn: Indian Desk  
DHHS Regional Attorney, Region VI, Dallas (1 Set) Attn: Indian Desk  
DHHS Regional Attorney, Region VII, Kansas City (1 Set) Attn: Indian Desk  
DHHS Regional Attorney, Region VIII, San Francisco (1 Set) Attn: Indian Desk  
DHHS Regional Attorney, Region X, Seattle (1 Set) Attn: Mr. McBride

Category B: Holders of the partial Compendium

Associate Director, Office of Administration and Management (1 Set)  
Associate Director, Office of Tribal Activities (1 Set)  
Associate Director, Office of Planning, Evaluation and Legislation (1 Set)  
Associate Director, Office of Program Operations (1 Set)  
Director, Division of Community Development and Tribal Support (1 Set)  
Personnel Operations Branch (1 Set) Attn: Mr. Sharlow  
Chief, Contract Health Care Branch, IHS (1 Set)  
Chief, Contracts/Grants Management Branch, IHS (1 Set)  
Chief, Resources Management Branch, IHS (1 Set)  
Chief, Environmental Health Branch, IHS (1 Set)  
CHS Office, Aberdeen Area Office (1 Set) Attn: Mr. Baybars  
CHS Office, Alaska Area Office (1 Set) Attn: Mr. Moffatt  
CHS Office, Albuquerque Area Office (1 Set) Attn: Mr. Beckwith  
CHS Office, Bemidji Program Office (1 Set) Attn: Ms. Anderson  
CHS Office, Billings Area Office (1 Set) Attn: Mr. Littlelight  
CHS Office, Navajo Area Office (1 Set) Attn: Mr. Gillson  
CHS Office, Oklahoma City Area Office (1 Set) Attn: Mr. Wahpepah  
CHS Office, Phoenix Area Office (1 Set) Attn: Ms. Kerrigan  
CHS Office, Portland Area Office (1 Set) Attn: Ms. Hansel  
CHS Office, California Program Office (1 Set) Attn: Mr. Jamison  
CHS Office, ORD, Tucson (1 Set) Attn: Mr. Howard  
CHS Office, Nashville Program Office (1 Set) Attn: Dr. Betts  
Facilities Management Branch, IHS, Albuquerque (1 Set) Attn: Mr. Shopteese  
PHS Claims Division (1 Set) Attn: Mr. Simon  
OGC, BAL Division (3 Sets) Attn: AGC; Mr. Tim White; and Ms. Sarah Hertz  
OGC, PH Division (1 Set) Attn: Ms. Reusing  
Director, Division of Indian Resource Liaison (1 Set)

Category C: Ad Hoc

Mr. Moran, Div. of Grants and Procurement Management, HRSA  
Dr. Birch, Div. of Indian Resource Liaison, OTA  
Mr. Casebolt, Program Planning Branch, OPEL

DEPARTMENT OF HEALTH & HUMAN SERVICES

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G.H. Ivey - Page 2

It is the unequivocal position of the U.S. General Services Administration (GSA) and the General Counsel of GSA that Congress, in Section 101 of Public Law 97-51, incorporated by reference, and thereby adopted, a provision of an un-enacted bill which would have (had it been enacted by Congress) waived the "fifteen percent rule" of 40 U.S. Code 278a. (Public Law 97-51 is the "Joint Resolution making continuing appropriations for the fiscal year 1982, and for other purposes." Public Law 97-51 provided spending authority for fiscal 1982 for the Department of Health and Human Services, and the Department of Interior and Related Agencies, as well as for GSA.) Further, it is the position of GSA that the waiver of the "fifteen percent rule" applies to all Federal lessee agencies, not just to GSA. Finally, GSA's position is that Congress has annually -- in continuing appropriations resolutions for fiscal periods to date -- continued to incorporate by reference the same un-enacted provision waiving the fifteen percent limit on rental. The GSA position is reflected in an October 13, 1981, two-page Memorandum to all Regional GSA Administrators; the above positions represent GSA's positions at the present time. I spoke recently with four GSA officials, all of whom unequivocally stated that GSA's position is that the fifteen percent limit has been repealed by Congressional action. One of these was Hilary Peoples, who was referred to on page two of the October 13, 1981, GSA memorandum. I also consulted with Mel Valkenburg, the attorney with Headquarters GSA who is familiar with the legal analysis by which GSA has concluded that Congress lifted the fifteen percent limit in October 1981 and has not reimposed it or any other limit.

Under these circumstances, it would probably be safe to conclude that a lease could be drawn up that deviates above the fifteen percent limit. The issue of the possible waiver of the fifteen percent limit came up, as you recall, in the lease negotiations for the 47-Unit staff quarters at Bethel, constructed by Calista Construction. At that time, I advised that the GSA "analysis" that Congress had repealed the fifteen percent limit was somewhat obscure and tenuous, and that the better view would be to operate, in our negotiations, as if the fifteen percent limit were still in effect. I am still of the view that it is by no means clear that Congress has, as a matter of law, actually repealed the limit. For example, no annotations in Title 40 of the U.S. Code exist which give even a hint that the limit in 40 U.S. Code 278a has been rescinded. The statutory interpretation analysis is, in my view, somewhat shaky and obscure; and no one I have talked to in GSA, including their legal counsel, has been able to articulate the legal analysis cogently, in my opinion.

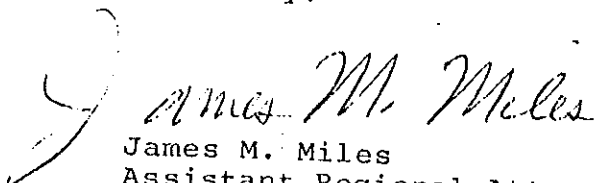
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